TEOH GUAT LOOI

v.

NG HONG GUAN

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
AHMAD FAIRUZ JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: A-02-271-95]
21 SEPTEMBER 1998

TORT: *Negligence - Res ipsa loquitur - Application of maxim - Whether necessary to prove exactly how accident happened - Prima facie case of negligence proved - Whether onus of proof shifts to defendant*

CIVIL PROCEDURE: *Trial - Fatal accident - Dependency action - Negligence - Submission of no case to answer - Election not to call evidence - Effect of*

The plaintiff brought a dependency action against the defendant in respect of the death of her husband, Tay Kok Wah ('the deceased'). The undisputed facts were that the deceased and one Ng Seng Wah ('Ng') were standing on either side of Ng's car when the defendant reversed his car into the side where the deceased was standing. Ng did not witness the actual collision, but, having heard the crashing sound of the defendant's car colliding into his car, saw the deceased lying on the ground, gravely injured. The deceased later died in hospital.

In her statement of claim, the plaintiff pleaded *res ipsa loquitur*. At the trial, the defence submitted that there was no case to answer at the close of the plaintiff's case. The judge put counsel for the defence to his election to stand by his submission and not to call evidence. After considering the evidence, the judge found that negligence had not been proved because he disbelieved the evidence of Ng, who was the only eye-witness called by the plaintiff, and dismissed the plaintiff's action. The plaintiff appealed.

Held:

Per NH Chan JCA (majority)

[1] The circumstances of an accident may raise the presumption of negligence under the maxim of *res ipsa loquitur*. The defendant's car was found in a position where, in the ordinary course of things, it had no right to be, that is, colliding with Ng's car. Plainly, the accident could not have happened without negligence on the defendant's part and a *prima facie* case of negligence was established.

[2] A *prima facie* case is established where it is not possible to prove precisely how an accident happened, and the evidence shows the accident could not have happened without negligence on the defendant's part.

[3] Although Ng did not see how the accident happened, it occurred in a way that *prima facie* could not have happened without negligence on the defendant's part. This *prima facie* case shifted to the defendant the onus of proving that he was not negligent. The defendant made no attempt to do that. This was a classic case of *res ipsa loquitur*.

[4] On the evidence, the plaintiff had succeeded in establishing liability. As the defendant had elected not to call evidence, there was no question of ordering a new trial. The appeal was allowed, and the case remitted to the trial judge for assessment of damages only.

Per Mokhtar Sidin JCA (dissenting)

[1] In order for the maxim *res ipsa loquitur* to apply, the plaintiff has firstly to establish a *prima facie* case of negligence. Here, the plaintiff had relied solely on the evidence of Ng, who had not witnessed the accident, and whose evidence had been disbelieved by the trial judge.

[2] An appellate court should be slow to interfere with the findings of the trial judge who had the advantage of having seen and heard the witnesses. There was no reason to depart from the judge's conclusion on Ng. On the contrary, there was ample evidence to support his conclusion.

[3] Without Ng's evidence, the evidence at most showed that the defendant's car had knocked into Ng's car. There was no evidence to show that the defendant's car had knocked into the deceased and the court could not safely make an inference to that effect. The maxim *res ipsa loquitur* could only operate where it was shown that the defendant had knocked down the deceased. As such, the appeal should be dismissed with costs.

[Appeal allowed by the majority.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Plaintif telah memulakan tindakan tanggungan terhadap defendan berhubung dengan kematian suaminya, Tay Kok Wah ('simati'). Fakta-fakta yang tidak dipertikaikan adalah bahawa simati dan seorang bernama Ng Seng Wah ('Ng') telah berdiri di salah satu sisi kereta Ng ketika defendan mengundurkan keretanya ke tempat di mana simati berdiri. Ng tidak menyaksikan pelanggaran sebenar, tetapi, setelah mendengar bunyi dentuman kerana keretanya dilanggar oleh kereta defendan, mendapati simati tergelimpang, cedera dengan teruknya. Simati telah kemudiannya meninggal dunia di hospital.

Dalam pernyataan tuntutannya, plaintif telah membangkitkan *res ipsa loquitur*. Di perbicaraan, pihak pembelaan telah berhujah bahawa tidak terdapat apa-apa kes untuk dijawab pada penutupan kes plaintif. Hakim membenarkan peguam bagi pihak pembelaan mengikut pilihannya untuk membentangkan penghujahannya dan tidak memanggil keterangan. Selepas mempertimbangkan keterangan, hakim mendapati bahawa kecuaian telah tidak dibuktikan kerana beliau tidak mempercayai keterangan Ng, yang merupakan satu-satunya saksi yang dipanggil oleh plaintif, dan menolak tindakan plaintif. Plaintif telah merayu.

Diputuskan:

Oleh NH Chan (majoriti)

[1] Hal keadaan sesuatu kemalangan boleh membangkitkan tanggapan kecuaian di bawah maksim *res ipsa loquitur*. Kereta defendan telah didapati dalam kedudukan di mana dalam keadaan biasa ianya tidak layak atau tidak seharusnya berada dalam keadaan itu, iaitu berlanggaran dengan kereta Ng. Jelasnya, kemalangan itu tidak mungkin berlaku tanpa kecuaian di pihak defendan dan satu kes kecuaian *prima facie* telah dibuktikan.

[2] Kes *prima facie* dibuktikan di mana adalah tidak berkemungkinan untuk membuktikan dengan tepatnya bagaimana sesuatu kemalangan berlaku, dan keterangan menunjukkan kemalangan tidak mungkin berlaku tanpa sebarang kecuaian di pihak defendan.

[3] Walaupun Ng tidak melihat bagaimana kemalangan itu berlaku, ianya telah berlaku dengan cara bahawa *prima facie* ianya tidak mungkin berlaku tanpa kecuaian di pihak defendan. Kes *prima facie* ini telah memindahkan kepada defendan bebanan untuk membuktikan bahawa beliau tidak cuai. Defendan telah tidak berusaha untuk melakukan perkara itu. Ini merupakan kes *res ipsa loquitur* yang klasik.

[4] Berdasarkan keterangan, plaintif telah berjaya menunjukkan wujudnya tanggungan. Oleh kerana defendan telah memilih untuk tidak memanggil keterangan, tidak berbangkit persoalan memerintahkan satu perbicaraan yang baru. Rayuan dibenarkan, dan kes diremitkan kepada hakim perbicaraan untuk taksiran gantirugi sahaja.

Oleh Mokhtar Sidin HMR (menentang)

[1] Untuk maksim *res ipsa loquitur* menjadi terpakai, plaintif haruslah pertamanya menentukan satu kes *prima facie* kecuaian. Di sini, plaintif telah bergantung semata-mata ke atas keterangan Ng, yang telah tidak menyaksikan kemalangan itu, dan keterangan mana telah tidak dipercayai oleh hakim perbicaraan.

[2] Mahkamah Rayuan harus berlengah untuk mencampuri keputusan hakim perbicaraan yang mempunyai kelebihan kerana telah melihat dan mendengar saksi-saksi. Tiada alasan untuk menyimpang dari keputusan hakim mengenai Ng. Sebaliknya, terdapat keterangan yang secukupnya untuk menyokong keputusannya.

[3] Tanpa keterangan Ng, keterangan yang ada cuma menunjukkan bahawa kereta defendan telah melanggari kereta Ng. Tidak terdapat keterangan yang menunjukkan bahawa kereta defendan telah melanggari simati dan mahkamah tidak boleh secara selamatnya membuat inferens mengenainya. Maksim *res ipsa loquitur* hanya boleh beroperasi di mana ditunjukkan bahawa defendan telah melanggari semati. Oleh yang demikian, rayuan seharusnya ditolak dengan kos.

[Rayuan dibenarkan menurut majoriti.]

Cases referred to

Bennett v. Chemical Construction (GB) Ltd [1971] 1 WLR 1571 ***(foll)***
Halliwell v. Venables [1930] 143 LT 217 ***(cit)***
Laurie v. Raglan Building Co [1941] 3 All ER 332 ***(foll)***
Lloyde v. West Midlands Gas Board [1971] 1 WLR 749 ***(foll)***
McGowan v. Stott [1923] (Unreported) ***(refd)***
Parry v. Aluminium Corporation Ltd [1940] 162 LT 236 ***(cit)***
Simirah v. Chua Hock Lee [1963] MLJ 239 ***(cit)***
Woods v. Duncan [1946] AC 401 ***(foll)***
Yuill v. Yuill [1945] P 15 ***(refd)***

Cases referred to: (by dissenting judge)

Clarke v. Edinburgh and District Tramways Co Ltd [1919] The Scottish Law Reporter (Vol LVI) 303 ***(foll)***
Lloyde v. West Midlands Gas Board [1971] 1 WLR 749 ***(foll)***
Seng Heng Electrical v. Chua Len Teng [1970] 1 MLJ 67 ***(foll)***
Tay Kheng Hong v. Heap Moh Steamship Co. Ltd [1964] 130 MLJ 87 ***(foll)***

For the appellant - Dalgit Singh (Harbans Singh with him); M/s Gurdev Dalgit, Su & Co
For the respondent - Vijayaram Krishnan; M/s Azim Ong & Krishnan

[Appeal from High Court, Taiping; Civil Suit No: 23-7-92]

Reported by Anne Khoo

JUDGMENT

NH Chan JCA:

In this appeal, the facts are simple and not controverted. At the time in question one Mr Ng Seng Wah was standing beside the driver's door of his motor car AW 2255 which was parked on the nearside of the road. The deceased (ie, the husband of the plaintiff (appellant)) was also standing next to Mr Ng's stationary car near the offside rear door of the vehicle. At that moment another motor car BCC 4647 driven by the defendant (respondent) reversed into the offside rear portion of Mr Ng's car, although Mr Ng did not see the actual collision. He did, however, hear a crashing sound and when he turned around he saw that the respondent's car had already backed into the rear of his car. He ran to the back of the two cars and found the deceased lying on the ground behind the vehicles. The deceased was gravely injured and shortly after he succumbed to his injuries.

In this case, at the conclusion of the evidence called for the plaintiff, the defence submitted that there was no case for the defendant to meet. The judge below ruled in his favour after putting counsel for the defendant to his election to stand by his submission and not to call evidence. The plaintiff's action was dismissed. The judge found that negligence was not proved because he did not believe that Mr Ng, who was the only eye witness called by the plaintiff, actually saw how the accident happened as detailed by him.

The plaintiff appeals to this court.

The plaintiff is the widow of the deceased. In her statement of claim, she has pleaded *res ipsa loquitur.*

The circumstances of an accident may raise the presumption of negligence under the maxim of *res ipsa loquitur*. Where a car mounts the pavement it has been held to afford a *prima facie* case of negligence against the driver (*McGowan v. Stott* [1923], unreported, followed and reported in *Halliwell v. Venables* [1930] 143 LT 215, 217).

In *Laurie v. Raglan Building Co.* [1941] 3 All ER 332, Lord Greene M.R. (with whom Goddard and Du Paroq LJJ agreed) said, at 335, 336:

> What is the position where a person lawfully on the pavement is struck by a vehicle, which, in the ordinary course of things, has no right to be in that position? ... it is said that the evidence which was led at the trial established that the wheels of the lorry never mounted the pavement at all, and on that proposition there is based the argument that, whereas, where a vehicle mounts the pavement with its wheels, a *prima facie* case of negligence is raised, no such *prima facie* case is raised in a case where all that happens is that some

> portion of the vehicle hangs over the pavement and hits a person lawfully upon that pavement. ... I cannot see why any distinction is to be drawn, for the purpose of the rule relating to a *prima facie* case of negligence, between a case where the wheels of a vehicle actually mount the pavement and one where a portion of the vehicle sweeps across the pavement. In each case, the vehicle is in a position where it has no right to be.

Here in the present case, the defendant's car was found in a position where, in the ordinary course of things, it had no right to be. It was found behind Mr Ng's parked car after knocking into it. The deceased, who was then standing beside the rear offside door of Mr Ng's parked car only a moment ago, was found lying on the ground at the back of the two vehicles. Plainly, the accident could not have happened without negligence on the part of the defendant. In my view a *prima facie* case of negligence has been established by the plaintiff.

In *Lloyde v. West Midlands Gas Board* [1971] 1 WLR 749, Megaw LJ describes *res ipsa loquitur* as in essence no more than a common sense approach to the effect of the evidence in certain circumstances. It means that a plaintiff *prima facie* establishes negligence where: (i) it is not possible for him to prove precisely how the accident happened, but (ii) on the evidence as it stands he manages to show that the accident could not have happened without negligence on the part of the defendant. This is how Megaw LJ put it, at 755:

> I doubt whether it is right to describe *res ipsa loquitur* as a "doctrine." I think that it is no more that an exotic, although convenient, phrase to describe what is in essence no more than a common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances. It means that a plaintiff *prima facie* establishes negligence where: (i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; but (ii) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety.

See also *Bennett v. Chemical Construction (GB) Ltd* [1971] 1 WLR 1571, 1575, where Davies LJ put it more succinctly, thus:

> In my view it is not necessary for that doctrine to be pleaded. If the accident is proved to have happened in such a way that *prima facie* it could not have happened without negligence on the part of the defendants, then it is for the defendants to explain and show how the accident could have happened without negligence.

Here, in the instant case, Mr Ng did not see how the accident happened. That being the case, the plaintiff was unable to prove exactly how the accident happened. But on the uncontroverted facts, the accident is proved to have happened in a way that *prima facie* it could not have happened without negligence on the part of the defendant. That raises a *prima facie* case of negligence against the defendant so that it now shifts to him the onus to show that he was not negligent or to give an explanation as to how the accident could have happened without negligence being attributed to him. The defendant made no attempt to do that in this case. In my judgment this is a classic case of *res ipsa loquitur*.

The principle of *res ipsa loquitur* only shifts the onus of proof on the defendant the task of showing he was not negligent or of giving an explanation of the cause of the accident which had happened without negligence on his part (*Woods v. Duncan* [1946] AC 401 at 419, 439). At 419, Viscount Simon said:

> The case against Lieutenant Woods has been put as an application of the principle known as *res ipsa loquitur,* since he was in charge of the forward compartment. Even so, that principle only shifts the onus of proof, which is adequately met by showing that he was not in fact negligent. He is not to be held liable because he cannot prove exactly how the accident happened.

And at 439, Lord Simonds said:

> But to apply this principle is to do no more than shift the burden of proof. A *prima facie* case is assumed to be made out which throws upon him the task of proving that he was not negligent. This does not mean that he must prove how and why the accident happened : it is sufficient if he satisfies the court that he personally was not negligent. It may well be that the court will be more easily satisfied of this fact if a plausible explanation which attributes the accident to some other cause is put forward on his behalf; but this is only a factor in the consideration of the probabilities. The accident may remain inexplicable, or at least no satisfactory explanation other than his negligence may be offered : yet, if the court is satisfied by his evidence that he was not negligent, the plaintiffs' case must fail.

Here, a *prima facie* case of negligence has been established at the close of the plaintiff's case. Although the plaintiff was unable to prove exactly how the accident happened, but on the uncontroverted evidence as it stands the accident is proved to have happened in such a way that *prima facie* it could not have happened without negligence on the part of the defendant. That being the case, the principle of *res ipsa loquitur* then shifts the onus of proof on the defendant to explain and show how the accident could have happened without negligence on his part.

After the evidence for the plaintiff had been concluded, counsel for the defendant submitted that there was no case for him to meet. The judge followed the proper practice in this sort of situation (as lucidly set out in the judgment of Goddard LJ in *Parry v. Aluminium Corpn Ltd* [1940] 162 LT 236 and approved in *Simirah v. Chua Hock Lee* [1963] MLJ 239, 241, CA) by putting counsel for the defence to his election to stand by his submission and not to call evidence. I must add that there is no particular magic about putting counsel to his election not to call evidence. This is how Lord Greene M.R. put it (*Laurie v. Raglan Building Co.*), at 337:

> ... However, I do not wish it to be thought that there is any particular magic about that question being asked, because it seems to me that counsel can make it perfectly clear, by the words which he uses and by the way in which he acts, that he does not intend to call any evidence, and, that being so, he must be taken to have given a negative answer to the question which the judge might otherwise have put to him.

On the evidence as it stands, it follows from what I have said that the plaintiff has established a *prima facie* case of negligence against the defendant which remains unrebutted because, at the trial at the conclusion of the plaintiff's case, the defendant had elected not to call evidence. That being so, it is clear to my mind that the plaintiff's action which was dismissed by the judge below is to be restored and dealt with on the evidence as it stands. On the evidence as it stands, the plaintiff has established liability with the result that the appeal is allowed on the question of liability with costs here and below.

There can be no question here of ordering a new trial as that can only be considered if the defendant had submitted that there was no case where no election was made; see *Simirah v. Chua Hock Lee* [1963] MLJ 239, 241, and also *Yuill v. Yuill* [1945] P. 15, 18 where Lord Greene M.R. said:

> ... if for any reason ... the judge does not put counsel to his election, and no election in fact takes place, counsel is entitled to call his evidence just as if he had never made the submission.

The only matter which remains is that of damages which the judge below did not assess even though evidence in respect of that had been adduced before him at the trial. The case must be remitted to him in order that the damages could be assessed.

Ahmad Fairuz JCA:

I have had the opportunity of reading the draft judgment of my learned brother NH Chan, judge Court of Appeal, and for the reasons stated therein I agree with his conclusion that the appeal should be allowed with costs here and below and that the case be remitted to the trial judge for assessment of damages.

Mokhtar Sidin JCA:

The facts in respect of this appeal have been clearly stated by my learned brother, NH Chan JCA, in his judgment and there is no necessity to repeat them. The only issue before us is whether the learned judge was right in his decision when he dismissed the appellant's claim.

In her claim the appellant relied entirely on the maxim of *res ipsa loquitur* to prove her claim against the respondent. In my view, the application of this maxim depends on the evidence of each case as clearly stated by Megaw LJ in the case of *Lloyde v. West Midlands Gas Board* [1971] 1 WLR 749, where at p. 755 he said:

> I doubt whether it is right to describe *res ipsa loquitur* as a "doctrine". I think that it is no more than an exotic, although convenient, phrase to describe what is in essence no more than a common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances. It means that a plaintiff *prima facie* establishes negligence where: (i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; but (ii) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety.

As can be seen from that case, in order for this maxim to apply, the plaintiff has to establish a *prima facie* case of negligence first. This should be on finding of facts by the learned trial judge.

As can be seen from the notes of evidence and the judgment of the learned trial judge there was only one witness to the whole incident and that is PW4. It is clear that the plaintiff (PW1) was never at the scene, neither were PW2 and PW3. The police witnesses, PW5 and PW6, were also not at the scene at the time of incident. In my view the appellant relied entirely on the evidence of PW4 to establish a *prima facie* case of negligence on the part of the defendant. It is clear to me that the trial judge found, as a matter of fact that PW4 did not witness the incident. In this respect it is necessary for me to refer to his judgment. The relevant passage appeared at p. 102 of the Record of Appeal where the trial judge said:

> ... In the Statement of Claim, the plaintiff categorically averred that motorcar BCC 4647 driven by the defendant negligently reversed and collided into the deceased. Unfortunately, Ng Seng Wah (PW4) the so called principal eyewitness for the plaintiff faltered in his evidence-in-chief and admitted, firstly, that he did not see motorcar BCC 4647 reversing and, secondly, he did not see motorcar BCC 4647 colliding into the deceased. Under cross-examination, Ng Seng Wah (PW4) admitted that a portion of his police report lodged on August 21, 1992 at about 4.35 p.m. (see the Agreed Bundle) was wrong particularly the following passage: "orang itu (referring to the deceased) telah dilanggar oleh motorkar kawan saya (referring to the defendant)." Ng Seng Wah (PW4) again agreed under cross-examination that he did not see the deceased avoiding motorcar BCC 4647 as it reversed nor did he see the deceased jumping from the position where he last stood. In a nutshell, Ng Seng Wah (PW4) did not witness the accident.

Further down at p. 105 the trial judge said:

> I have taken particular care in this case to record the evidence of the plaintiff and her witnesses, almost verbatim. I have gone through the evidence and in my judgment Ng Seng Wah (PW4) has to come to court, taken the affirmation and told me deliberate lies. Finally when his conscience pricked him, he crumbled and told this court that he did not witness the accident. Even the sketch plan (see the Agreed Bundle at page 9) drawn by Sergeant 41170 Mustapha bin Yusof (PW6) did not assist the plaintiff at all. When the said Sergeant arrived at the scene the two motorcars were not there and there were no glass fragments on the road at all. The sketch plan did not show as to how the accident took place; it merely showed the site of the accident. Surely this kind of sketch plan would be of no use to the plaintiff. To add insult to injury, Corporal 90178 Salliah bte Ishak (PW5) lodged a police report when the deceased was first warded at the hospital (see the Agreed Bundle at page 8) and in her police report she gave the reason for the accident to be: "akibat kemalangan jalan raya di Jalan Lahat (kereta terbabas)." This runs counter to the Statement of Claim and the said Corporal explained under examination-in-chief that she obtained the details from the admission book of the hospital. Again the said Corporal made a mistake in regard to the location of the accident: it was not at Jalan Lahat but rather at Jalan Persiaran Dato'. It is most unfortunate for the widow to lose her husband at so young an age and be saddled with two children. But the law is clear. The plaintiff must prove her case. On the available evidence, I ruled that the plaintiff had made out no case and, I, dismissed it with costs.

From the above passages it is clear to me that the trial judge, based on the evidence before him, found that PW4 did not see how the deceased fell. Nowhere was there any evidence to show that it was the defendant's car that knocked into the deceased. At the most the only evidence available was that the defendant's car knocked into the rear of the stationary car of PW4. There is, in my view, a *prima facie* case of negligence on the part of the defendant in knocking into PW4's car but not against the deceased.

It is trite law that finding of facts by the trial judge should not be disturbed. Ong Hock Thye CJ (Malaya) (as he was then) in the case of *Seng Heng Electrical v. Chua Len Teng* [1970] 1 MLJ 67 at p. 68 said:

> With respect, we do not think that he was justified in substituting his own opinion for that of the magistrate "where the credibility or reliability of one or more witnesses has been in dispute, and where a decision on these matters has led the trial judge to come to his decision as a whole,": see *Benmax v. Austin Motor Co. Ltd.,* per Lord Reid. Citing *Thomas v. Thomas* his Lordship recalled this passage from the speech of Lord Thankerton:
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> Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.

The reason for doing so is explained by the House of Lords in the case of *Clarke v. Edinburgh and District Tramways Company Limited* [1919] The Scottish Law Reporter (Vol. LVI) p. 303 where at p. 304 Lord Shaw said:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observation with regard to the credibility or not. I can, of course, quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case things are much more evenly divided: witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion the duty of an appellate court in those circumstances is, each judge of it, to put himself, as I now do in this case, the question, Am I – who sit here without these advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then, recognising that I have not the same privileges which he enjoyed, it appears to me to be my duty to defer to his judgment.

The Privy Council reiterated the same principles in the case of *Tay Kheng Hong v. Heap Moh Steamship Co. Ltd* [1964] 30 MLJ 87 where Lord Guest, delivering the judgment of the court, at p. 92 said:

> There is a heavy onus on a party who seeks to displace the conclusion formed by the trial Judge on questions of fact. The principles upon which an appellate Court should act in reviewing the decision of a judge of first instance were stated by Lord Thankerton in *Watt* or *Thomas v. Thomas* at p. 487.
>
> I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;
>
> II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;
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> III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.

Turning to the present appeal, as I have said earlier, the only witness called by the plaintiff to give evidence of the incident was PW4. The learned trial judge had rejected his evidence on the ground that he was an untruthful witness. The learned judge gave his reasons for doing so. I could not find any reason to depart from his conclusion on that witness and on the other hand there are ample evidence to support his conclusion. Without the evidence of PW4 there is no evidence whatsoever of the incident, what more to show that the defendant knocked into the deceased which in my opinion will trigger the *prima facie* negligence on the part of the defendant.

Even assuming that the evidence of PW4 is to be accepted, I have the opportunity of going through his evidence in the Record of Appeal. PW4 in his evidence admitted that he did not see the defendant reversing his car nor did he witness the defendant's car collided with the rear of his car. He also gave evidence that just before he heard the sound of collision he saw the deceased by the side of the left rear door of his car. He did not see the defendant's car knocking down the deceased. On hearing the sound of collision he turned around and saw the deceased lying on the road. The deceased who was still alive was sent to the hospital. The whole effect of the evidence of

PW4 is that he did not see the defendant's car knocking into the deceased. As such there is no evidence to show that the defendant's car knocked into the deceased.

Is it safe for the court based on the evidence available before it to make an inference that the deceased was knocked down by the defendant's car? In my opinion it could not do so and the maxim of *res ipsa loquitur* cannot operate to help one coming to that conclusion. In my view the maxim could only operate when it has been established by evidence that the deceased was knocked down by the defendant's car. It is clear to me that in the present appeal, whether PW4's evidence is accepted or not, there is no evidence to show that the defendant's car knocked into the deceased. For the above reasons I beg to differ from my learned brothers. I hold that the maxim of *res ipsa loquitur* does not apply in the present appeal.

I would therefore dismiss the appeal with costs.